

EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY  
AT THE TIME OF FILMING. IF AND WHEN A  
BETTER COPY CAN BE OBTAINED, A NEW FICHE  
WILL BE ISSUED.

NO.

89-1770

FILED

FEB 26 1990

JOSEPH F. SPANIO  
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

TeleSTAR, Inc.,

Petitioner;

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent;

MCI COMMUNICATIONS CORPORATION,  
WESTERN TELE-COMMUNICATIONS, INC.,

Intervenors.

APPENDIX (VOLUME II)

PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA

DONALD F. BEACH  
5881 Leesburg Pike  
Suite 303  
Falls Church, VA 22041  
Telephone: (703) 931-5925  
ATTORNEY FOR PETITIONER

DATE FILED: February 26, 1990  
(CORRECTED COPY)



## **APPENDIX**

### **TABLE OF CONTENTS**

<u>DOCUMENT:</u>	<u>PAGE</u>
<u>VOLUME I</u>	
47 C.F.R. 21.3	1A
47 U.S.C. 309(e)	1A
47 U.S.C. 312(a)	3A
5 U.S.C. 556(d)	5A
D.C. Circuit Court Nos. 88-1420 and 88-1445 <u>Order</u> , denying review, November 27, 1989	7A
D.C. Circuit Court Nos. 88-1420 and 88-1445 <u>Order</u> , denying suggestion for en banc review November 27, 1989	9A
D.C. Circuit Court Nos. 88-1420 and 88-1445 <u>Judgement</u> , denying review, FCC decision affirmed, September 22, 1989	11A
FCC <u>Memorandum Opinion And Order</u> , FCC 88-171, "Final Order" denying TeleSTAR's Applications May 19, 1989	14A
FCC <u>Memorandum Opinion And Order</u> , FCC 88M-1113, Dismissing TeleSTAR's Applications For Failure to Prosecute, April 15, 1988	67A

FCC Memorandum Opinion And  
Order, FCC 87-374, "Remand  
Hearings", December 3, 1987

74A

VOLUME II

FCC Order And Notice Of  
Apparent Liability, FCC 88-24,  
Levying \$10,000 Forfeiture  
On MCI Telecommunications  
Corporation, January 25, 1988

110A

FCC Order, FCC 89-132, U.S.  
House of Representatives  
Subcommittee on Oversight  
And Investigations for the  
Energy and Commerce Committee;  
And General Accounting Office  
Investigation of the FCC

159A

Comments On Petition For  
Reconsideration by Gregory Voft,  
FCC Chief Of Enforcement  
Division, January 12, 1988

171A

Letter From Howard Wilchins,  
FCC Deputy Chief of Enforcement  
Division, "Cessation Of Hostilities"  
To TeleSTAR, MCI And WTCI,  
March 3, 1988

183A

Affidavit of MCI's Counsel  
John Wells King "On TeleSTAR  
Rescinding Antitrust Litigation  
Against MCI", May 3, 1989

184A

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C.

FCC 88-24  
37281  
1383

In the Matter of )  
MCI TELECOMMUNICATIONS )  
CORPORATION )  
Petition for Revocation of )  
Operating Authority )

ORDER AND NOTICE OF APPARENT LIABILITY

Adopted: January 21, 1988  
Released: January 25, 1988

By the Commission:

1. In this order, we address a "Petition for Revocation of FCC Authority for MCI" filed by TeleSTAR, Inc. and its principals (TeleSTAR)<sup>1</sup> requesting immediate suspension and revocation of Commission radio authorizations issued to MCI Telecommunications Corporation (MCI).<sup>2</sup> MCI filed an Opposition to TeleSTAR's petition, and TeleSTAR replied.<sup>3</sup> For reasons discussed more fully below, we deny TeleSTAR's petition for revocation of MCI's

authorizations. We are, however, issuing to MCI a Notice of Apparent Liability for forfeiture in the amount of \$10,000 for engaging in premature and/or unauthorized construction in violation of Section 319(a) of the Communications Act, 47 U.S.C. 319(a), and Sections 21.3(b) and 21.7(a) of the Commission's Rules, 47 C.F.R. 21.3(b), 21.7(a)4

## I. CONTENTIONS OF THE PARTIES

### A. TeleSTAR

2. TeleSTAR requests immediate suspension and revocation of license authorizations issued to MCI based on allegations that MCI has: (1) engaged in unlawful premature construction with respect to seven routes; (2) engaged in 20 separate incidents of unauthorized service commenced under a construction permit; (3) violated the Commissions's rules regarding frequency coordination on three occasions; (4) violated local zoning and building permit

laws; (5) violated federal environmental laws; (6) improperly represented in a construction permit application that four antenna sites were not located on federal lands; and (7) in connection with several of these allegations, engaged in misrepresentation and demonstrated a lack of candor. In addition, TeleSTAR argues that (8) the Commission has shown improper favoritism to MCI over TeleSTAR in violation of the Equal Protection Clause of the U.S. Constitution.<sup>5</sup>

#### B. MCI

3. MCI generally either denies most of the alleged violations or disputes their relevance to MCI's qualifications to be a Commission licensee. It criticizes much of TeleSTAR's supporting material as being insufficiently specific and disagrees with various inferences and interpretations made by TeleSTAR.

4. As a result of its detailed internal investigation, however, MCI admits that it

has engaged in unlawful premature construction with respect to four of the seven routes identified by TeleSTAR. MCI also admits that, on two occasions, it improperly commenced operation prior to filing its Form 436 license applications, and incorrectly checked the wrong box regarding use of federal lands on Form 435 applications on four occasions.

## II. DISCUSSION

### A. Premature Construction

5. Under Section 319(a) of the Communications Act and Sections 21.3(b) and 21.7(a) of our Rules, an applicant is prohibited from commencing station construction prior to receipt of Commission authorization for such construction.<sup>6</sup> The prohibition on premature construction is not absolute, however, rather, "the literal language of Section 319(a) must be read in conjunction with our companion statutory responsibility to provide a prompt institution" of service to the public.

Patton Communications Corporation, FCC 2d 336, 338 (1980). In this regard, while pre-authorization tower construction or installation of radio antennas is clearly prohibited, we have permitted, inter alia, the following steps to be taken prior to receipt of authorization to construct: site clearance, pouring of concrete footings for a tower, installation of a tower base and anchors, installation of a new power line, purchase and on-site storage (but not installation) of radio equipment and other "preliminary steps" not having an "intrinsic" radio communication use "related to the proposed facility." See Christian Broadcasting of the Midlands, Inc., 103 FCC 2d 375 (1986), reconsideration denied, FCC 87-328, released Oct. 19, 1987; King Country Broadcasters, 55 RR 2d 1591, 1592 (1984), overruled on other grounds, Christian Broadcasting of the Midlands, Inc., 103 FCC 2d 375 (1986), reconsideration denied, FCC

87-328, released Oct. 19, 1987; Patton Communications Corporation, 81 FCC 2d 336, 338 (1980); Childress Broadcasting Corp., 24 RR 669 (1962).

6. With these standards in mind, we now turn to TeleSTAR's specific allegations regarding premature construction.

1. Glenshaw/Erie

7. TeleSTAR claims<sup>7</sup> that MCI constructed towers and engaged in other unspecified construction with respect to four sites on its Glenshaw to Erie, Pennsylvania route prior to grant of an STA in December, 1982. MCI admits that it improperly began tower construction of all four sites, beginning on October 7, 1982, roughly two months before receiving Commission authorization to do so. We have no facts before us showing that MCI engaged in any other improper premature construction.

2. Las Vegas/Dominguez Hills

8. TeleSTAR claims that MCI engaged in unspecified construction on its Las Vegas, Nevada to Dominguez Hills (Los Angeles), California route, specifically at the Newberry and Heaps Peak sites, prior to grant of an STA on November 8, 1985. In addition, it claims that MCI installed two antennas on its Sidewinder tower for which it never received authorization.

9. We have no evidence before us that MCI engaged in any improper preconstruction with respect to the Newberry site. The fact that some unspecified construction was observed "in the summer of 1985" (Petition at 7, n.22 & Att. A.4) does not indicate that any such construction was improper. Moreover, MCI has explained that such construction was merely "initial site preparation." (Opposition at 53.) With respect to the Heaps Peak site, MCI admits that the tower at this site was in fact

constructed approximately two weeks prior to receipt of an STA.8 MCI also admits that it did place (but has not operated) two unauthorized antennas on the Sidewinder tower, and that those antennas remain in place even though MCI has not applied for Commission authorization for them. While MCI claims that such "storage" of antennas on a tower is permissible, we conclude that the placement (and continuing maintenance) of these antennas on the tower constituted unauthorized construction. Compare Childress Broadcasting Corp., 24 RR 669 (1962).

### 3. Downers Grove/Pleasant View

10. TeleSTAR claims that MCI "likely" engaged in premature construction of its Downers Grove, Illinois to Pleasant View, Illinois route in 1982. (Petition at 10. MCI admits that it improperly constructed four towers on this route, beginning approximately seven weeks prior to grant of authorization to commence such construction on July 7, 1983.

4. Downers Grove/Creve Coeur

11. TeleSTAR claims that MCI engaged in premature construction with respect to its Downers Grove, Illinois to Creve Coeur, Missouri route in 1981, because it completed construction within 26 days of grant of an STA on October 22, 1981. It says such construction was "implausible," and cites to the fact that Commission staff informally noted an initial question regarding the timing of MCI's license applications. (Petition at 10.) MCI's explanation, supported by affidavit, of how construction was accomplished in such a period convinces us that TeleSTAR has not shown that any improper premature construction took place with respect to this route.<sup>9</sup>

5. Sacramento/Chico

12. TeleSTAR claims that, prior to receiving an STA on February 10, 1987, MCI engaged in premature construction with

respect to the Erle, Gridley and Chico sites on its Sacramento, California to Chico, California route.

13. With respect to the Erie site, TeleSTAR provides an unsworn, unnotarized statement that the tower we constructed by the end of January , 1987, even though MCI did not receive its STA until February 10, 1987. MCI has explained, however, that with respect to the tower it merely acted as a contractor for the site owner, Southern Pacific, in replacing an existing tower. As MCI points out, any necessary authorization for the replacement tower was the responsibility of Southern Pacific, not MCI. TeleSTAR also provides an unsworn, unnotarized statement that antennas were placed on the Erie tower in February, 1987. Any premature installation of antennas would, of course, be MCI's responsibility, since it was the party seeking Commission authorization in that regard. MCI's evidence

shows, however, that antenna mounting at the Erle site did not begin until February 13, 1987. This is both after the STA was granted and fully consistent with TeleSTAR's statement that such antenna installation was observed some time in February, 1987. Accordingly, we find that no improper premature construction by MCI has been shown with respect to the Erle site.

14. We reach a similar conclusion with respect to the Gridley site. Any premature tower construction was the responsibility of Southern Pacific, the site owner, not MCI. Moreover, MCI has shown that antenna mounting at this site did not begin until February 25, 1987, after grant of the STA.

15. TeleSTAR also alleges that construction of the tower at the Chico site was completed January 7, 1987, prior to the February 10, 1987 grant of MCI's STA. As MCI explains, however, the Chico tower was also

part of its Chico to Portland, Oregon route, for which it received construction authorization on July 24, 1986. Accordingly, the tower construction was not premature. Although TeleSTAR did not allege premature installation of any antennas at the Chico site, MCI admits that three antennas were prematurely mounted at the Chico site up to four days prior to receipt of the STA.

6. Lafayette/New Zion

16. TeleSTAR claims that, prior to receiving a construction permit on February 26, 1987, MCI engaged in premature construction with respect to the Lafayette, Carenco and New Zion sites on MCI's Lafayette, Louisiana to New Zion, Louisiana route.

17. With respect to the Lafayette site, TeleSTAR alleges only that building construction took place prior to grant of the construction permit. MCI concedes this fact, but explains that the building had no

intrinsic radio use; its use included the housing of MCI marketing and administrative personnel. Given this fact, along with the other evidence (e.g., daily field reports) provided by MCI, it is apparent that no showing has been made that improper premature construction took place at the Lafayette site.

18. With respect to the Carenco site, TeleSTAR has provided only unsworn, unnotarized statements generally alleging that site construction began in January, 1987 (before grant of the STA) and was completed in March, 1987 (after grant of the STA). No specific allegation of improper premature construction, such as tower construction, has been made. Moreover, MCI has shown that tower construction did not commence until March 12, 1987. Accordingly, we find no showing of improper premature construction with respect to the Carenco site.

19. TeleSTAR provides an unsworn, unnotarized statement that the tower at the New Zion site was completed before Christmas, 1986, and similar statements that other, unspecified construction took place earlier in 1986. The non-specific allegations regarding unspecified construction do not demonstrate improper premature construction. Moreover, MCI's evidence regarding tower construction, including daily field reports and purchase orders, convinces us that no improper premature tower construction occurred.

#### 7. Denver Junction/Colorado

20. TeleSTAR claims that MCI engaged in unspecified construction at the Cabin Gulch and Colorado South sites on its Denver Junction, Colorado to Colorado Springs, Colorado route beginning in March or the Spring of 1985. TeleSTAR's generalized claims do not support a finding of improper preconstruction, especially

since we note that MCI received an STA for these sites on March 26, 1985. Moreover, MCI has demonstrated through its daily field reports that tower construction did not commence until after grant of the STA.8.

#### Conclusion

21. For the most part, TeleSTAR's allegations regarding premature construction are not sufficiently specific or substantiated to demonstrate that MCI has engaged in unlawful premature construction. However, in response to TeleSTAR's allegations, MCI has brought to our attention certain facts and made admissions that lead us to conclude that MCI has engaged in improper premature construction as follows: (1) construction of four towers on the Glenshaw/Erie route approximately two months early, in 1982; (2) construction of one tower on the Las Vegas/Dominguez Hills route in 1985; (3) unauthorized construction of two antennas on the Las Vegas/Dominguez

Hills route in 1985, which has not yet been rectified; (4) construction of four towers on the Downers Grove/Pleasant View route approximately seven weeks early in 1982; and (5) mounting of three antennas on its Sacramento/Chico route up to four days early in 1987.

B. Unauthorized Operation

22. Section 21.212(b) of our Rules requires that a permittee may commence service tests (e.g., begin commercial service) "after" the filing of a license application (Form 436), provided, inter alia, that the Commission's Engineer-in-Charge of the local radio district has been notified at least two days in advance of the beginning of tests of the time and date when such tests "are scheduled to begin." 47 C.F.R. 21.212(b). Form 436 reiterates this requirement and mandates that the permittee provide "the date service tests are scheduled to begin and the date of notification of service tests to the FCC

Engineer-in-Charge." It provides spaces labeled "Service Tests Start Date" and "EIC Notification Date" for responses to these items.

23. TeleSTAR claims that, on 20 separate occasions,<sup>11</sup> MCI began commercial operation (service tests) prior to filing its Form 436. In support of these allegations, it provides no evidence of when MCI actually commenced service with respect to the sites involved. Rather, it assumes that operation must have commenced on the "scheduled" dates set forth in MCI's Form 436s and in its notifications to the Engineer-in-Charge. In all 20 instances,<sup>12</sup> these scheduled dates for commencement of service were prior to the dates MCI's Form 436s were filed.

24. We find no basis for TeleSTAR's general inference that the scheduled service dates in MCI's filings must have been the same as the actual ones.

Indeed, in its notifications to the Engineer-in-Charge, MCI stated that service would commence "on or after" the dates stated (See Opposition at Ex. D), and MCI explained that service routinely can commence long after the scheduled startup date because of technical and other difficulties. In addition, with two exceptions noted below, MCI denies that service actually commenced prior to the filing of its Form 436s. However, based on information contained in a 1984 MCI filing, TeleSTAR does document that MCI filed a Form 436 four years late on its Downers Grove/Boyertown, Pennsylvania route. However, MCI itself disclosed this information to the Commission in 1984. (See Opposition at Ex. D-3.2). In addition to this previously-admitted error, MCI has admitted that, in 1980, it filed a Form 436 for its Chicago/Creve Coeur route late (by eight months, according to TeleSTAR).<sup>13</sup>

C. Frequency Coordination

25. Section 21.100(d) of our Rules requires that, prior to filing a construction permit application, applicants "coordinate proposed frequency usage with existing users in the area and other applicants with previously filed applications, whose facilities could affect or be affected by the new proposal in terms of frequency interference or restricted ultimate system capacity." 47 C.F.R. 21.100(d). Section 21.100(d) mandates pre-filing notification of a proposal, in "oral or written form," and provides for a 30-day response period for those notified. An applicant must certify in its application that frequency coordination, including response, has been completed. If a party does not respond to notification, or if "technical problems are not resolved," that fact must be disclosed in the application. *Id.* See also 47 C.F.R. 21.199(d)(6) ("[a]ll

technical problems that come to light during coordination must be resolved unless a statement is included with the application to the effect that the applicant is unable or unwilling to resolve the conflict and briefly the reason therefore.")

26. TeleSTAR claims that MCI violated Section 21.100(d) on three occasions, involving: (1) its Los Angeles, California to Las Vegas, Nevada route in 1985; (2) its Downers Grove to Chicago to Pleasant View route in 1983; and (3) its Waynevile, Ohio to Atlanta, Georgia route in 1981.

#### 1. Los Angeles/Las Vegas

27. TeleSTAR claims that MCI violated Section 21.100(d) by stating in a 1985 Form 435 construction permit application with respect to its Los Angeles to Las Vegas route that "[f]requency coordination with other carriers has been successfully completed." even though there were

unresolved frequency coordination disputes with two cable systems. MCI explains that its frequency coordinator contractor had informed MCI that frequency clearance had been accomplished. Once the frequency clearance disputes became evident to MCI after its application was filed, MCI worked with the cable systems to resolve the problems.

28. We believe that, while MCI appears to have relied in good faith on its frequency coordinator contractor, its failure to notify the Commission of unresolved frequency disputes in its construction permit application (and its statement that coordination had been successfully completed) constituted a violation of Section 21.100(d). Regardless of its own good faith, MCI is responsible for the actions of its agents with respect to compliance with our rules.

2. Downers Grove/Chicago/Pleasant View

29. From the facts set forth by both TeleSTAR and MCI, it appears to be undisputed that MCI filed a construction permit application in 1983 for its Downers Grove to Chicago to Pleasant View, Illinois route stating that "frequency coordination with other carriers has been successfully accomplished," even though MCI and United Video, Inc., (United Video) were still engaged in negotiations for an assurance from MCI that no interference would occur because if any did, MCI would take any necessary steps to resolve it. (See Opposition at 14 and Ex. B-4); Petition at Att. A.40 pp. 1-2) MCI appears to have believed that, because the unresolved frequency coordination dispute did not relate to the need for remedial changes in its technical proposal, no notification to the Commission was required and also appears subsequently to have acted to resolve the

negotiations. See 40, infra. Nevertheless, MCI's failure to disclose the disputes existence in its application (and its statement that coordination had been successfully accomplished) constituted a violation of Section 21.100(d).

### 3. Wayneville/Atlanta

SO. TeleSTAR claims that MCI filed Form 435 applications for its Wayneville, Ohio to Atlanta, Georgia route in 1981 without giving other users 30 days to respond to its notification and that MCI failed to disclose the existence of an unresolved frequency coordination dispute with Southern Bell. As an initial matter, we have been presented with no evidence that Southern Bell in fact objected to any of MCI's frequency coordination notifications prior to the filing of MCI's applications. As to the lack of 30-day notice, the notifications involved were apparently subsequent (not initial) notifications, with

respect to which our Rules provide for shortened response periods. See 47 C.F.R. 21.100(d)(8). It appears that MCI followed these rules in good faith by requesting responses to subsequent notifications in less than 30 days. Accordingly, we find no violation in this instance.

D. Local Laws

31. TeleSTAR alleges that MCI violated local building and zoning laws in connection with sites in San Bernadino, California, and local building laws in connection with sites in Pueblo County, Colorado. MCI responds that both situations involved building permits, not zoning laws. In any event, it is clear that whatever violations of local ordinances occurred do not affect MCI's qualifications to remain a Commission licensee. As we recently made clear, only three classes of non-FCC misconduct are considered in evaluating character qualifications: (1) adjudicated fraudulent

statements to "another governmental unit"; or (3) adjudicated violations of anticompetitive or antitrust laws in connection with station-related misconduct.

Policy Regarding Character Qualifications In Broadcasting Licensing, 102 FCC 2d 1179, 1195-1201, on reconsideration, 1 FCC Rcd 421 (1986), appeal dismissed sub nom. National Association of Better Broadcasting v. FCC No. 86-1179(D.C. Cir. June 11, 1987)

#### E. Environmental Laws

32. In its Reply, TeleSTAR makes various passing references to alleged violations by MCI of federal environmental laws. (See Reply at 21 n.41, 25, 39, 40). Due to the lack of specificity and clarity in its allegations, we are unable to determine their precise nature and cannot, therefore, specifically address them. We note, however, that its statements that microwave towers over 100 feet are "major" actions under the Commission's environmental

rules are based on a 1974 order that was changed on reconsideration. Implementation of the National Environmental Policy Act of 1969, 40 Fed. Reg. 53,391 (Nov. 18, 1975) ("We have decided on a basic cutoff of 300 feet for all towers"). The tower height restriction was lifted altogether in 1986. Amendment of Environmental Rules, 51 Fed. Reg. 14,999 (April 22, 1986).

#### F. Use of Federal Lands

33. TeleSTAR claims that MCI violated Section 21.20(b)(7) of the Commission's Rules by stating, in response to Item 12 on Form 435s filed for its Las Vegas to Dominguez Hills route in 1985, that four particular sites (Waterman, Sidewinder, Halloran Summit and Goodsprings) were leased, rather than on Federal Government land. MCI admits that it inadvertently checked the wrong box on these applications.

34. Section 21.20(b)(7) of the Rules lists, as an example of a deficiency that results in an application being defective, that "[t]he application does not include U.S. Forest Service or Bureau of Land Management certification of site availability under 1.70 if this chapter whenever a proposed new or modified facility is to be located on land under the jurisdiction of these agencies." 47 C.F.R. 21.20(b)(7) (emphasis added). Section 1.70 and the similar certification requirement contained in Section 21.15(b) were eliminated in 1977 on the basis that there was "no need for such procedures."

Elimination of Coordination Procedures With U.S. Department of Agriculture and U.S. Department of the Interior, 42 Fed. Reg. 27,894 (1977). Accordingly, the example set forth in Section 21.20(b)(7) reflects no underlying substantive requirement, and MCI's apparently inadvertent checking of the

wrong box, although an incorrect statement, violates no substantive rule.

G. Misrepresentation/Lack of Candor

35. TeleSTAR alleges that MCI engaged in misrepresentation or demonstrated lack of candor in connection with statements in applications regarding its premature construction violations, unauthorized operation, frequency coordination violations, violations of local ordinances and use of federal lands. It is apparent that, in connection with its violations in these area (set forth above), MCI's applications to the Commission did contain certain inaccuracies. Accordingly, we will examine these violations to determine whether the inaccuracies rose to the level of misrepresentation or lack of candor.

36. In making these determinations, we will look closely to determine whether we have been presented with evidence that MCI intended to deceive

the Commission, since as we have previously made clear, "Both misrepresentation and lack of candor represent deceit . . . ." Fox River Broadcasting, Inc., 93 FCC 3d 127, 129 (1983). Unless there is evidence showing "deceptive intent," we will not be able to find that misrepresentation or lack of candor has occurred. Id., The "bare existence of a mistake" in an application, "without any indication that the licensee meant to deceive the Commission, does not elevate such a mistake to the level of an intentional misrepresentation or raise a substantial and material question of fact."

Kaye-Smith Enterprises, 71 FCC 2d 1402, 1415 (1979).

37. With respect to MCI's premature and/or unauthorized construction on four routes, TeleSTAR has presented no evidence showing that MCI intentionally failed to disclose in its applications the fact that premature and/or unauthorized

construction had, or was about to, occur. MCI's explanations of how the various instances of premature and/or unauthorized construction occurred convinces us that they generally resulted from failures in internal communications or communications with contractors, that the MCI officials who signed applications to the Commission were not aware of any such violations, and that any misstatements were inadvertent.<sup>15</sup>

38. With respect to MCI's unauthorized operation on two routes, again TeleSTAR has presented us with no evidence showing that MCI intentionally failed to file its license applications on a timely basis and therefore engaged in misrepresentation or lack of candor in connection therewith. Since MCI would have no motive to file license applications eight months or four years after commencing service, its mistakes in this regard appear to have been inadvertent. the fact that MCI

voluntarily brought at least one (and apparently both) of these mistakes to the Commission's attention -- 24 n.13, supra -- bolsters our conclusion that it did not engage in any intentional deceit with respect to its unauthorized operation.

39. With respect to MCI's filing of a license application for a construction permit that had expired three days previously, we have also been presented with no evidence of intentional deception on MCI's part. Indeed, because notification to the Engineer-in-Charge with respect to this site was given prior to expiration of the construction permit, and the license application was apparently executed prior to expiration at the construction permit, the late filing of the license application appears to have been inadvertent. (See Opposition at Exs. D-12.1, D-12.2)

40. We also have been presented with no evidence that MCI intentionally

sought to deceive the Commission in failing to notify the Commission in its construction permit applications of two unresolved frequency coordination disputes or including statements indicating that coordination had been successfully completed. In one of the instances, only MCI's frequency coordinator contractor, not MCI itself, was aware of the dispute. In the other instance, MCI appears to have believed in good faith that notification was not required because the dispute did not relate to the need for remedial changes in its technical proposal. In this second instance, it appears that coordination between MCI and United Video had been substantially completed prior to the filing of MCI's application, except that MCI had not yet provided "unequivocal assurance" to United Video's satisfaction that any future interference problems would be taken care of by MCI. (See Petition at Att. A. 40). The matter was brought to the

Commission's attention in a petition to deny filed by United Video in which United Video "reserve[d] the right" to request that MCI's authorization be conditioned on the resolution of any such future interference if the unequivocal assurance was not forthcoming from MCI. Id. The matter was speedily resolved when MCI provided the requested assurance. (Opposition at Ex. B-4) While MCI should have notified the Commission of the remaining unresolved dispute--See 29, supra -- its belief that such notification was unnecessary was not unreasonable in light of the circumstances and suggests that MCI had no intent to deceive the Commission. Moreover, the fact that in each instance MCI proceeded expeditiously to resolve the dispute strongly suggests the absence of any deceptive intent or motive, and, in the absence of any evidence of intent to deceive, we conclude that MCI did not engage

in misrepresentation or evidence a lack of candor to the Commission that would cause us to doubt its propensity for truthfulness as a licensee.

41. TeleSTAR has presented no examples of any inaccurate statements made to the Commission by MCI in connection with its violation of local ordinances. In addition, since these violations apparently did not affect MCI's site availability, it does not appear that MCI had an affirmative obligation to bring these matters to our attention. In any event, we have no evidence before us of any intent to deceive in this regard, and therefore find no misrepresentation or lack of candor by MCI.

42. Finally, with respect to MCI's checking of the wrong box regarding the use of federal lands on four occasions, we accept MCI's explanation that such action was inadvertent. Not only has TeleSTAR presented us with no evidence regarding

intentional deceit on MCI's behalf, but the absence of any underlying substantive rule in this area suggest the absence of any motive for deception.<sup>16</sup>

43. In sum, after a careful review of TeleSTAR's allegations and MCI's responses, we find no evidence that MCI intended to deceive the Commission with regard to any of the violations we have found herein. Accordingly, in line with the standards set forth above, while we admonish MCI to exercise more care in its dealings with the Commission, we conclude that there has been no misrepresentation or lack of candor by MCI.

#### H. Favoritism to MCI

44. TeleSTAR makes a number of unfocused, unsupported allegations that the Commission and its staff are in some fashion exhibiting favoritism toward MCI at the expense of TeleSTAR, in violation of the Equal Protection Clause of the U.S.

Constitution. Much of this argument (e.g., Petition at 22-27) appears to be merely an improper collateral attack on our treatment of TeleSTAR's construction permit applications. See TeleSTAR, Inc., FCC 86D-30, released April 18, 1986, aff'd, 2 FCC Rcd 5 (Rev. Bd. 1987), remanded, FCC 87-374, released Dec. 3, 1987. Our disposition of this proceeding is unrelated to the matters at issue in TeleSTAR. Therefore, we will not address here matters relating to the TeleSTAR proceeding.

45. TeleSTAR also argues that Commission staff has improperly granted STAs to MCI on a rapid basis. The staff treatment of MCI's STA applications has, however, been no different than those of numerous other carriers and has been consistent with the requirements of Section 309(f) of the Communications Act and Section 21.25 of our Rules.<sup>17</sup>

## I. Revocation

46. Section 312(a) of the Communications Act states that we "may" revoke a station license for, inter alia, "false statements knowingly made" to the Commission, conditions coming to our attention that would warrant denial of an initial application, "willful or repeated failure to operate substantially as set forth in the license," or "willful or repeated violation" of the Communications Act or our Rules. 47 U.S.C. 312(a) (emphasis added).

47. As we have stated previously, initiation of revocation proceedings through an order to show cause, as permitted by Section 312(a), "is, of course, wholly subject to our discretion." Tulsa Cable Television, 68 FCC 2d 869, 877 (1978). "Pursuant to the legislative intent behind 47 U.S.C. 312, . . . the Commission has complete discretion, after considering

allegations of noncompliance with our rules, even prima facie evidence of violations, to determine not to issue orders to show cause . . . ." *Id.* Indeed, within our "broad discretion in this area, the Commission can refuse to issue an order to show cause based upon the petition of a third party even if it is determined that a violation of Commission rules exists." Humboldt Bay Video Co., 56 FCC 2d 68, 71 n.9 (1975). See also C. J. Community Services, Inc. v. FCC, 246 F, 2d 660, 664 (D.S.C. Cir. 1957) ("When a violation of the Act has been shown, the Commission may revoke a station license, but under 312(b), it also may impose a lesser sanction.").<sup>18</sup>

48. In exercising our discretion under Section 312(a), we do not believe it is appropriate to initiate revocation proceedings in this case. MCI's isolated violations,<sup>19</sup> while not to be condoned, do not in our view justify license revocation.

We note, in this regard, that we find no evidence of misrepresentation or lack of candor on MCI's part or any intention to violate our Rules or the Communications Act.<sup>20</sup> Indeed, MCI's violations appear, in general, to be inadvertent. Moreover, MCI has been forthright in its responses to the Commission.

J. Notice of Apparent Liability

49. While we do not believe MCI's isolated and apparently inadvertent violations justify institution of revocation proceedings, we nevertheless admonish MCI to exercise more care in carrying out its responsibilities as a Commission licensee. We also conclude that monetary sanctions are appropriate. Accordingly, for those violations which have occurred during the previous year, and are therefore actionable under Section 503(b) of the Communications Act, we are hereby issuing a Notice of

Apparent Liability for forefeiture in the amount of \$10,000.21

50. Of the various MCI violations discussed above, only two are actionable under the Section 503(b) statute of limitations: (1) MCI's premature construction at its Chico site (Sacramento/Chico route), at which, in February, 1987, it mounted three antennas on its tower four days prior to receiving Commission authorization for such construction; and (2) MCI's continued unauthorized construction at its Sidewinder site (Las Vegas/Dominguez Hills route), at which, for the past year, it has retained two antennas mounted on its tower without prior Commission approval. In each case, MCI has constructed in violation of Section 319(a) of the Communications Act and Sections 21.3(b) and 21.7(a) of our Rules.

51. MCI's violations are both willful and repeated as defined in Section

503(b)(1),22 and imposition of a forfeiture is therefore authorized under Section 503(b)(1). In determining the amount of the forfeiture to be imposed, we take into account "the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." 47 U.S.C. 503(b)(2). Applying this standard to the premature/unauthorized construction at issue here, we determine that a forfeiture in the amount of \$10,000 for MCI's actionable violations is appropriate.

III. ORDERING CLAUSES

52. ACCORDINGLY, it is ordered that the "Petition for Revocation of FCC Authority for MCI" filed by TeleSTAR,. Inc. and its principals IS DENIED.

53. IT IS FURTHER ORDERED,  
pursuant to section 503(b) of the

Communications Act of 1934, 47 U.S.C. 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. 1.80, that MCI Telecommunications Corporation IS APPARENTLY LIABLE FOR FORFEITURE in the amount of \$10,000, for premature and/or unauthorized construction in violation of Section 319(a) of the Communications Act, 47 U.S.C. 319(a), and Sections 21.3(b) and 21.7(a) of the Commission's rules, 47, 47 C.F.R. Secs. 21.3(b), 21.7(a).

54. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. Sec. 1.80(f)(3), that MCI TeleCommunications Corporation may, within 30 days of this notice, pay the full amount of forfeiture in the manner provided for in Section 1.80(h) of the Commission's Rules, 47 C.F.R. Sec. 1.80(h), or may file a response showing why forfeiture should not be imposed or should be reduced.

55. IT IS FURTHER ORDERED that a copy of this Order and Notice of Apparent Liability for forfeiture shall be sent by certified mail, return receipt requested, to: MCI Telecommunications Corporation, 1133 19th Street, N.W., Washington, D.C. 20036..

FEDERAL COMMUNICATIONS  
COMMISSION

H. WALKER FEASTER, III  
Acting Secretary

### Footnotes to Document

1 TeleSTAR's petition was filed on March 25, 1987. Because petitions to revoke filed by third parties are not cognizable under the Communications Act or our Rules, consistent with our prior practice, we will treat TeleSTAR's petition as an informal request for action under Section 1.41 of our Rules, 47 C.F.R. Sec. 1.41. See KSDK, Inc., 93 FCC 2d 893 (1983).

2. MCI holds various point-to-point microwave authorizations under Part 21 of the Commission's Rules.

3. MCI's opposition was filed June 22, 1987. TeleSTAR filed a reply to opposition on July 23, 1987. MCI filed a second opposition, accompanied by a motion for its acceptance, on August 14, 1987. Section 1.45(b) of the Rules specifies that replies to oppositions should be limited to discussions of matters raised in the opposition; discussion of new matter is not authorized. However, in light of TeleSTAR's discussion of new matter in its reply, we grant MCI's motion.

4 Part 21 was recently revised. See Revision of Part 21 of the Commission's Rules, FCC 87-284, released Sept. 25, 1987. In this Order, we refer to Part rule sections as they existed prior to revision, since those were the rules in effect at the time of the behavior at issue in this proceeding.

5 TeleSTAR's allegations, as well as MCI's responses, are set forth in more detail in the discussion section below.

6 Section 319(a) of the Act provides that "no license shall be issued under the authority of this Act for the operation of any station unless a permit for its construction has been granted by the Commission." 47 U.S.C. Sec. 319(a). Section 319(d) exempts common carriers from the

construction permit requirement unless the Commission decides otherwise, which it has for carriers, such as MCI, operating under Part 21.

Section 21.3(b) of our Rules tracks Section 319(a) of the Act. 47 C.F.R. Sec. 21.3(b). In addition, it provides for waivers of the construction permit requirement and also states: "No construction or modification of a station may be commenced without a construction permit, a modified construction permit, or other authority issued by the Commission for the exact construction or modification to be undertaken, except as may be specifically provided for in other sections of this part." In this connection, Section 21.25(a) of the Rules permits the grant of Special Temporary Authority (STA) to construct and/or operate microwave facilities. Section 21.7(a) tracks the pre-construction authorization requirement of Section 21.3(b) and requires grant of a construction permit prior to commencement of construction.

7 In general, we base our description of TeleSTAR's claims on its supporting evidence, not simply on its own characterizations of that evidence. In this instance, we note that only with respect to one site (Spartansburg), does TeleSTAR provide any evidence that tower construction began prior to December, 1982.

8 With respect to TeleSTAR's claim that the Commission granted MCI an STA for more sites than it had requested (Petition at 8), TeleSTAR makes reference only to MCI's October 8, 1985 request for an STA for two sites (Petition at ATT. A.41), while the STA granted for the entire route apparently related to a separate MCI request, filed October 18, 1985. (Petition at Att. A.26.)

9 While MCI's storage of replacement radio equipment at its antenna sites was permissible, installation of such equipment prior to receiving construction

authorization would contravene our rules. Even if such a violation occurred (which is not clear from the facts presented to us), it would not affect our decision not to initiate revocation proceedings and would not subject MCI to forfeiture because of the one-year statute of limitations. See 47 U.S.C. Sec. 503(b)(6)(B).

10 In any event, MCI has explained that construction occurring in 1986 at this site (e.g., erection of a prefabricated building) related to use of this site as part of its Houston, Texas to Baton Rouge, Louisiana fiber optic route.

11 TeleSTAR initially provided a list of 23 instances of such alleged unauthorized operation, stating that its list included 21 separate instances. Subsequently, it stated that only 20 separate instances were involved.

12 The gaps between the scheduled dates for commencement of service and the date the Form 436s were filed generally ranged from three days to approximately two months, although in two instances the gaps were substantially higher (eight months, four years). In one additional instance, TeleSTAR alleged a one-year gap, but it mistakenly identified the year involved.

13 MCI also states that it explained the error with respect to this route when it filed its license application (Opposition at 20 n.13), although no supporting evidence of this fact is provided. In addition, according to our own records, it appears that, with respect to MCI's Hancock, Illinois to Downers Grove route, MCI's construction permit expired three days prior to its filing its license application on June 4, 1982, and that no accompanying request for reinstatement of its construction permit was made. MCI's license application for this route was, however, subsequently granted, and there is no evidence that, apart from the late filing of the license application, any unauthorized activity occurred.

14 Although not directly applicable to common carriers, the character qualifications standards adopted in the broadcast context can provide guidance in the common carrier area as well. See 1 FCC Rcd at 424; see also A.S.D. Answer Service, Inc., 1 FCC Rcd 753 (1986) (applying the broadcast character standards in a common carrier case). In any event, to the extent we were not to use broadcast character standards for guidance in this case, MCI's violation of local ordinances would be of even less significance. See Arizona Mobile Telephone Co., 93 FCC 2d 1147, 1153-55 (1983).

15 For example, while MCI originally planned to request authorization for eight antennas on its Chico tower, it ultimately sought and received authorization for only six. The additional two were nevertheless mistakenly installed by personnel who apparently did not realize that they were no longer to be included in the system. (See Opposition at 37-38 & n.26.) Since MCI had no intent to operate these two antennas, there appears to be no motive to deceive the Commission.

16 TeleSTAR's further suggestion in its Reply (at 5-8) that MCI engaged in additional misrepresentation by failing to bring to the Commission's attention in its Opposition to TeleSTAR's Petition matters first raised in TeleSTAR's Reply is a non sequitur. MCI cannot be faulted for having investigated only those allegations previously raised by TeleSTAR and for not having disclosed or explained in its Opposition allegations first raised in TeleSTAR's Reply.

17 We also note that the staff's grant of recent MCI applications conditioned on the outcome of this proceeding was entirely appropriate. See Reply at 10-11.

18 In contrast to the Section 312(a) standard, under Section 309(e), we are required to designate for hearing an application for an initial authorization or

for renewal if there is a "substantial and material question of fact" raised with respect to whether grant of the application would serve the public interest, convenience and necessity. See Citizens for Jazz on WRVR v. FCC, 775 F. 2d 392, 394-95 (D.C. Cir. 1985). We note, however, that even if we were evaluating TeleSTAR's allegations under Section 309(e) of the Act, we would find no basis for initiating revocation proceedings based on the facts before us. The isolated violations at issue here do not warrant the inference that MCI is not qualified to be Commission licensee. In addition, with respect to those allegations for which we find no violations, we would also conclude, if applying the Section 309(e) standard, that no substantial and material question of fact have been raised that would require a hearing to determine whether such violations occurred.

19 We note that MCI has over 1700 microwave authorizations. In our discussion above, we conclude that MCI has engaged in improper premature and/or unauthorized construction on four routes, engaged in unauthorized operation on two routes, filed a license application to cover a construction permit that had expired three days previously, failed to disclose unresolved frequency coordination disputes on two occasions and incorrectly checked the wrong box regarding use of federal land on four occasions.

20 Compare Pass Word, Inc. v. FCC, 673 F.2d 1363, 1365 (D.C. Cir.) cert. denied, 459 U.S. 840 (1982) (upholding revocation revocation misrepresentations to the agency") (emphasis in original); TeleSTAR, Inc., FCC 87-374, released Dec. 3, 1987.

21 Section 503(b)(6)(B) prohibits us from imposing a forfeiture penalty on common carriers for violations occurring more than one-year prior to issuance of the Notice of Apparent Liability. Given the violations

found herein, we would have imposed the maximum forfeiture permitted under the ACT -- \$20,000 -- if the statute of limitations had not already run on most of the violations.

22 Imposition of forfeiture is authorized for either willful or repeated acts. 47 U.S.C. Sec. 5034(b)(1). Here, however, MCI's actions were both willful (it took the action involved) and repeated (the violations were repeated over more than one day). See, e.g., Hale Broadcasting Corp., 79 FCC 2d 169 (1980); Pond Branch Telephone Co., 53 RR 2d 803, 804 (Comm. Car. Bur. 1983).

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
**WASHINGTON, D.C. 20554**

FCC 89-132

**In the Matters of**

TeleSTAR, Inc. Applications for )  
Authority to Construct New )  
Common Carrier Point-to )  
-Point Microwave Radio )  
Stations (CC Docket No. 85-202; )  
Files Nos. 1743 CF-P-85; )  
through 1757 CF-P-85) )  
Petition for Revocation of Operating )  
Authority for MCI TELECOMMUNICATIONS )  
CORPORATION Revisited )  
Petition for Revocation of Operating )  
Authority for WESTERN )  
TELE-COMMUNICATIONS, INC. )

ORDER

**Adopted: April 27, 1989;**  
**Released: April 28, 1989**

**By the Commission:**

1. By letter dated August 9, 1988,  
the Subcommittee on Oversight and  
Investigations, Committee on Energy and  
Commerce, U.S. House of Representatives  
(Subcommittee), informed the Commission that  
it was conducting an inquiry into the

above-captioned proceedings. By letters from the Chairman dated September 9, 1988, September 16, 1988, and February 28, 1989, the Commission provided copies of certain documents requested by the Subcommittee and declined to provide copies of certain other documents, e.g., non-public, deliberative documents. By letter dated April 3, 1989, the Subcommittee requested that the Commission provide copies of the previously-withheld documents, and also stated that it would be necessary for the Subcommittee staff to conduct interviews with various Commission personnel. In addition, the General Accounting Office (GAO) has commenced an informal inquiry that relates in part to these proceedings.

2. All of these proceedings are "restricted" adjudicatory proceedings under the Commission's ex parte rules. See 47 C.F.R. Sec. 1.1208.1 These rules prohibit communications relative to the merits or

outcome of a proceeding, made either to or from Commission decision-making personnel, unless, if written, they are served on the parties or, if oral, the parties have an opportunity to be present. See 47 C.F.R. Secs. 1.120(a), 1.1202(b), 1.1208(a).

3. Compliance with the commission's ex parte rules purposes of "ensur[ing] that the Commission's decisional processes are fair, impartial, and otherwise comport with the concept of due process" and of "deter[ing] improper communication and maintain[ing] the utmost public confidence in Commission proceedings . . . ." See 47 C.F.R. Sec. 1.1200(a). These rules are enforced strictly and waived only in extremely rare circumstances. A difficult question would be raised, for example, whether to waive the ex parte rules where such waiver would merely facilitate a congressional investigation that was prompted by a general concern about the

substantive outcome of an adjudicatory proceeding. Here, however, subsequent to our decisions in these proceedings, the Commission was informed of specific allegations of possible misconduct by Commission staff.<sup>2</sup> In light of these specific allegations of possible misconduct, as well as assurance from congressional staff that the investigation is concerned only with the possibility<sup>6</sup> that agency misconduct affected our decisions and not with the substance of those decisions themselves, we believe that it is appropriate for the Commission to facilitate congressional exercise of its oversight powers with respect to the integrity of the Commission's processes.

4. Accordingly, in order to permit the interviews requested by the Subcommittee and to provide access to the previously-withheld documents requested by the Subcommittee, the Commission is hereby

waiving its ex parte rules in these proceedings to the extent set forth herein. Specifically, the Commission will permit Commission personnel to respond to all questions from the Subcommitee (and the GAO) in connection with their inquiries<sup>3</sup> and will provide access to the Subcommitee (and, if requested, to the GAO) to the previously-withheld documents.<sup>4</sup> This waiver<sup>5</sup> is permissible under the Administrative Procedure Act (APA), which provides that the APA's ex parte restrictions (which apply here to CC Docket No. 85-202) do "not constitute authority to withhold information from Congress." 5 U.S.C. Sec. 557(d)(2).

5. In order to protect the due process rights of the parties to these proceedings<sup>6</sup> and in order to comply with the ex parte requirements of the APA,<sup>7</sup> the Commission is not waiving those portions of its ex parte rules that prohibit communications regarding the merits or

outcome of the proceedings that are transmitted from the Subcommitee or the GAO to Commission decision-makers. Neutral questioning by the Subcommittee or GAO staff is permissible; if, however, the Subcommittee or GAO staff conducting the interviews expresses a view, directly or indirectly, to Commission decision-making personnel as to the merits or outcome of the proceeding, the Commission decision-maker to whom the view is expressed must file a memoranda with the Managing Director reporting any such expression of views. See 47 C.F.R. Sec. 1.1212(b)8 Any such memoranda will be served on the parties to the relevant proceeding and placed in a public file associated with, but not a part of, the record in that proceeding. See 47 C.F.R. Sec. 1.1212(d),(e); 5 U.S.C. Sec. 557(d)(1)(C). As an additional mechanism for protecting the due process rights of the parties, the Commission is requesting that,

until the pending court appeals and any subsequent proceedings are completed, the Subcommittee and GAO not make available to others any information relating to the merits or outcome of the proceedings that it garners from the interviews or the previously-withheld documents.

6. The Commission finds that good cause exists for waiver of its ex parte rules as set forth above and that such waiver will serve the public interest. See 47 C.F.R. Sec. 1.3, 1.1200(a). In addition, this Order constitutes Commission approval, pursuant to 47 C.F.R. Sec. 0.463 and 19.735-206, for disclosure, by current and former Commission personnel,<sup>9</sup> to the subcommittee and GAO of information regarding the above-referenced proceedings in connection with the Subcommittee or GAO interviews and for access at the Commission's offices by the Subcommittee (and GAO if at the Commission's offices by

the Subcommittee (and GAO if requested) to documents previously withheld by the Commission.

7. Accordingly, IT IS ORDERED that the Commission's ex parte rules ARE WAIVED to the extent set forth above.

8. IT IS FURTHER ORDERED that the disclosure of information to the Subcommittee on Oversight and Investigations, Committee on energy and Commerce, U.S. House of Representatives, and the General Accounting Office, as set forth in this order, IS AUTHORIZED.

FEDERAL COMMUNICATIONS  
COMMISSION

Donna R. Searcy  
Secretary

FOOTNOTES

1 Because they are pending before the United States Court of Appeals for the District of Columbia, see Nos. 88-1153, 88-1419, 88-1420, 88-2445, 88-1144, and 89-1156 (D.C. Cir.), the proceedings remain subject to the Commission's ex parte rules. 47 C.F.R. Sec. 1.1208(a).

2. See Complaint, TeleSTAR, Inc. v. MCI Communications Corp., No. 89-C-0068-S (D. Ut. 1989), served on the Commission on

January 31, 1989, as an attachment to "Amendment to the Docketing Statements" in D.C. Cir. Nos. 88-1153, 88-1419 and 88-1832. Compare TeleSTAR, Inc. "Reply to WTCI's June 10, 1988 Response -- On Who Owns the Tower on its Sodrac Repeater Site," filed June 27, 1988. The Commission initiated its own informal investigation as a result of these specific allegations. The investigation revealed no evidence that the Commission's processes have in any way been tainted.

3 The interviews shall be conducted in accordance with the procedures agreed to by Subcommittee staff -- namely, that all interviewees will be permitted to have counsel present and to tape record the interviews. In addition, as discussed in paragraph 5, infra, the interviewers have agreed to attempt to phrase their questions neutrally so as not to express views on the merits of the proceedings.

4 The Subcommittee staff (or the GAO, if requested) will be permitted to review the documents at the Commission's offices. To the extent, after such review, they believe any particular documents relate to agency misconduct, they will be provided copies of such documents.

5 Because the Common Carrier Bureau participated in CC Docket No. 85-202 as a party, not as a decision-maker, the Commission's ex parte rules do not apply to it with respect to that hearing proceeding. Accordingly, a waiver is unnecessary to permit ex parte communications between Common Carrier Bureau staff and the Subcommittee with respect to the CC Docket No. 85-202 hearing proceeding.

6 See, e.g., Koniag, Inc. v. Andrus, 580 F 2d 601 (D.C. Cir. 1978); Pillsbury v. FTC, 354 F 2d 952 (5th Cir. 1966).

7 See 5 U.S.C. Sec. 557(d)(1)(A). The APA "prohibitions on ex parte communications relative to the merits apply to communications from Members of Congress . .

7 See 5 U.S.C. Sec. 557(d)(1)(A). The APA "prohibitions on ex parte communications relative to the merits apply to communications from Members of Congress . . ." H.R. Rep. No. 880-Part I, 94th Cong., 2d Ses. 21-22 (1976), reprinted in 1976 U.S. Code Cong. & Ad. News 2183, 2203. As noted, the APA ex parte restrictions apply to CC Docket No. 85-202.

8 The Subcommittee and GAO are being advised that any such expression of views will trigger the disclosure requirements under our ex parte rules. Accordingly Commission decision-making personnel being interviewed need not separately so advise the Subcommittee or GAO staff, as otherwise required by 47 C.F.R. Sec. 1.1212(a).

9 In light of this order, former Commission personnel need not request approval pursuant to FCC Directive, FCC INST 1113.4, Att. 1, to participate in interviews with the Subcommittee or GAO in connection with the above-referenced proceedings.

#### CERTIFICATE OF SERVICE

I, David A. Gross, do hereby certify that I have this 11th day of July, 1989, sent by United States mail, postage prepaid, a copy of the foregoing Errata to Reply Brief of the Appellant to the following:

Constance L. Dupre'  
U.S. Court of Appeals  
Room 5423  
Third and Constitution Avenue, N.W.  
Washington, D.C. 20001

Donna R. Searcy  
Secretary  
Federal Communications Commission  
Room 222  
1919 M Street, N.W.  
Washington, D.C. 20554

Sue Ann Preskill, Esquire  
Office of General Counsel  
Federal Communications Commission  
Room 602  
1919 M Street, N.W.  
Washington, D.C. 20554

Richard Thornburgh, Esquire  
Attorney General  
Department of Justice  
Washington, D.C. 20530

Richard H. Strodel, Esquire  
Steven A. Lancellotta, Esquire  
Wheeler & Wheeler  
Suite 500  
1625 K Street, N.W.  
Washington, D.C. 20006  
Counsel for WestMarc

John Wells King, Esquire  
William J. Byrnes, Esquire  
James E. Dunstan, Esquire  
Haley, Bader & Potts  
Suite 600  
2000 M Street, N.W.  
Washington, D.C. 20036  
Counsel for MCI Telecommunications  
Corporation

Donald F. Beach, Esquire  
5881 Leesburg Pike  
Suite 303  
Falls Church, Virginia 22041

David A. Gross /s/

David A. Gross

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of ) CC Docket  
the Application of ) No. 85-202  
)  
TeleSTAR, Inc. ) File Nos. 1743  
)  
For Authority to ) CF-P-85  
Construct New Common ) through 1757  
Carrier Point-to-Point ) CF-P-85  
Microwave Radio Stations.)

TO: The Commission

**COMMENTS ON PETITION FOR RECONSIDERATION**

Pursuant to Section 11.106(g) of the

Commission's Rules, 47 C.F.R. Sec. 1.106(g),  
the Chief, Common Carrier Bureau,  
respectfully submits these Comments on  
Petitions for Reconsideration filed by  
TeleSTAR, Inc. (TeleSTAR) in the  
above-captioned proceeding.<sup>1</sup>

**I. INTRODUCTION**

In a Memorandum Opinion and Order,  
FCC 87-374 (released December 3, 1987)  
(Remand Order), the Commission remanded this  
proceeding for further hearings on  
TeleSTAR's qualifications with instructions  
to the Presiding Administrative Law Judge to

expedite proceedings and to issue a Supplemental Initial Decision. The Commission, noting that the proceeding a single applicant and that denial of TeleSTAR's applications would inhibit the growth of competition in microwave services between the affected cities, said it could neither grant nor deny the applications because the "record [was] filled with gaps, inconsistencies and numerous unanswered questions." *Id.* at para. 27. The Commision further stated that the burden of proof with respect to TeleSTAR's qualifications remain on TeleSTAR. *Id.*

Presiding Judge Walter C. Miller subsequently ssued prehearing orders which contemplate thirteen days of additional hearings to begin on May 2, 1988, involving at least twelve individual witnesses, as well as seven categories of additional witnesses, to address the concerns raised in the Remand Order. See Further Prehearing

Order, FCC 87M-3240 (released December 10, 1987) (Further Prehearing Order, FCC 87M-3298 (released December 17, 1987) (Supplemental Prehearing Order)). Still, Judge Miller indicated his view that TeleSTAR's principals had already "said all they had to say, all they could say." Further Prehearing Order at para. 6 n.5.

## II. PETITION FOR RECONSIDERATION

In its petition, TeleSTAR requested that the Commission reconsider its Remand Order and, based on the record already established, grant TeleSTAR's applications and determine whether or not a forfeiture should be assessed. TeleSTAR maintains that sufficient evidence has already been presented to support a decision to grant or deny the applications. It argues that there is no indication that there is any relevant and material evidence which could be adduced which has not already been adduced. Therefore, it contends that the

Commission should affirm the Review Board's decision upholding the denial of its applications and issue its own decision predicated on the established record.

TeleSTAR points out that it is already in Chapter 11 bankruptcy proceedings and states that it does not have the financial means to participate in a remanded hearing. A final Commission order, TeleSTAR states, will at least allow it, if necessary, to test the Commission's action now by court appeal.

### **III. BUREAU'S COMMENTS**

A. The established Record Supports A Finding That TeleSTAR's Applications Should Be Granted.

The Bureau believes that an ultimate decision on TeleSTAR's qualifications would not be enhanced or assisted by the receipt of additional evidence. The original hearings in this matter delved into the potential evidence in great detail and required the expenditure of

considerable resources by this agency and the parties. The Bureau conducted a thorough examination of the record in light of the concerns expressed in the Remand Order. We continue to believe, as we did in our Proposed Findings of Fact and Conclusions of Law (Dec. 19, 1985) that the record provides an adequate basis for a finding that grant of TeleSTAR's applications would serve the public interest. In remanding this case for further hearings, the Commission was particularly concerned with what it perceived as the absence of "substantial evidence" concerning what caused Noel and Doyle Stewart (TeleSTAR's principal officers and shareholders) to adopt their claimed belief that no preconstruction approval was required under the Commission's Rules. Remand Order at paras. 16-24. The Commission apparently found it significant that the Private Placement Memorandum drafted by the Stewarts in January 1984 "recognized the

need for a 'pre-build' order." Id. at para. 20. We have reviewed the record, including the extensive testimony of the Stewarts and Steve Amundsen (TeleSTAR's director of marketing), all of whom the Bureau found to be forthcoming, credible witnesses, and the contemporaneous documentary evidence adduced at trial. We believe that there is substantial support for finding that whatever their understanding of the rules at the time the Private Placement Memorandum was prepared, TeleSTAR's principals did in fact adopt the mistaken belief that no preconstruction approval was required as a result of discussion with representative of Spectrum Planning, Inc. See Proposed Findings at 4-12, 18, TR. 257-58, 263, 274-75, 327-28, 376-77, 380-82, 463-66, 469-70, 504-09, 530-31; TeleSTAR Ex. 1, op. 6-7, 16, Att. G at 3, Att. I at 4, Att. H at 1, 7. Moreover, while we are troubled by numerous conflicts and inconsistencies in

the record concerning TeleSTAR's understanding of Commission requirements, we believe that the misstatements in TeleSTAR's predesignation pleadings are as much the fault of counsel as of Noel Stewart and Amundsen.

The Commission also found significant discrepancies in the record as to when TeleSTAR discovered that its construction was in violation of Commission Rules. Remand Order at paras. 24-26. TeleSTAR claims that it did not know that preconstruction was not permitted until it received a stop work order from its counsel, David Irwin of the firm Irwin and Lesse, on January 23, 1985. TeleSTAR Exs. 1 at 14, 23-24, 2 at 6; TR. at 331, 596-98. Uncontroverted facts establish that the construction was completely shut down by January 25, 1985. See TeleSTAR Exs. 16-18. Irwin, however, testified at hearing that he did not learn about the preconstruction

until a telephone conversation initiated by Amundsen on January 29, 1985, four days after TeleSTAR had halted construction on January 25. The Bureau has reexamined the transcript as well as the documentary evidence and agrees that the record in this regard is inconclusive. However, we are persuaded that there will probably be no additional material and relevant facts to be produced at hearing that would assist the Commission in its determinations. Because we found both the Stewarts and Amundsen to be forthcoming, credible witnesses, we continue to believe that the Commission may reasonably find on the record that the stop order came from Irwin on January 23 since we do not believe that TeleSTAR would have halted the substantial construction on its own without an authoritative command from its communications counsel. See Proposed Findings at 35-38.

Thus, while the Bureau would agree that this is a close case, we believe that TeleSTAR has carried its burden of proof and the matter may reasonably be resolved on the existing record, consistent with appropriate administrative and judicial precedents, so as to warrant grant of TeleSTAR's applications, on the condition that it pay a substantial forfeiture. See Common Carrier Bureau's Comments on Application for Review (August 10, 1987); see also Eagle Telecommunications, Inc., FCC 85-362 [59 RR Id 1293] (released July 19, 1985) (unauthorized construction and operation of a cable system by a telephone company did not warrant disqualification but a forfeiture in the amount of \$20,00 assessed for willful or repeated violations). TeleSTAR is a new, inexperienced would-be-entrant to the common carrier microwave service and has no previous history of rule violations or other noncompliance. Moreover,

there are no suggestions in the record that its premature construction caused interference to existing facilities. The Bureau remains confident that the sanction of the payment of a substantial forfeiture will suffice to ensure that in the future TeleSTAR will operate its facilities in conformance with the pertinent rules and regulations of the Commission.

B. There Are No Additional Material and Relevant Facts To Be Produced At Hearing That Would Be Determinative To The Commission In Ruling On TeleSTAR's Qualifications.

Based on our review of the record, as well as our prior investigation of the prospective witnesses identified in the Supplemental Prehearing Order, we are persuaded that there are no additional facts to be elicited at hearing that would substantially aid the Commission in its analysis of TeleSTAR's qualifications. It is

unlikely that the witnesses will have any better recollection of the facts at this time. Indeed, if they did, the testimony might be suspect. Thus, in the Bureau's view, any benefit which might result from further hearings at this time would be marginal at best. Moreover, there are certain equitable factors that warrant consideration. Given the fact that final Commission decision is some months away and TeleSTAR's financial status because of this litigation is in question as a result of its ongoing Chapter 11 bankruptcy proceedings, TeleSTAR maybe effectively precluded from establishing its qualifications as a result of additional, costly hearings that are not likely to adduce any additional material or relevant facts that would assist the Commission in ruling on TeleSTAR's qualifications. Under these circumstances, we believe that TeleSTAR's request that the

Commission rule on the established record is reasonable and should be granted.

Therefore, the Bureau urges the Commission to grant the petition for reconsideration, vacate the Remand Order and make a determination based on the established record whether TeleSTAR's applications should be granted. The Bureau believes that a just resolution of the proceeding warrants that the Commission grant the applications on the condition that TeleSTAR pay a substantial forfeiture.

Respectfully submitted,  
Gerald Brock  
Chief, Common Carrier Bureau

Date: 1-12-8

By: Gregory J. Vogt /s/  
Gregory J. Vogt  
Chief, Enforcement  
Division

Howard M. Wilchins /s/  
Howard M. Wilchins  
Deputy Chief  
of Enforcement Division

Thomas D. Wyatt /s/  
Thomas D. Wyatt  
Trial Attorney

FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

March 3, 1988

Frank J. Martin, Jr., Esq.  
Sutherland, Asbill & Brennan  
1275 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

Richard H. Strodel, Esq.  
Wheeler & Wheeler  
1729 H Street, N.W.  
Washington, D.C. 20006

John M. Scorce, Esq.  
MCI Communications Corporation  
1133 - 19th Street, N.W.  
Washington, D.C. 20036

Re: CC Docket No. 85-202

Gentlemen:

Enclosed please find a revised draft of the letter the Enforcement Division proposes to send to the General Counsel of the FCC regarding or efforts to bring the TeleSTAR proceeding to a close.

It is understood that counsel for TeleSTAR will be advising the parties by Friday, March 4, 1988, of his client's position regarding the cessation of all hostilities, which is a critical element of any resolution. We would appreciate your prompt response as soon thereafter as possible.

Sincerely,

Howard M. Wilchins /s/  
Howard M. Wilchins  
Deputy Chief, Enforcement  
Division  
Common Carrier Bureau

Enclosure

IN THE UNITED STATES DISTRICT DISTRICT  
COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

TELESTAR, INC., :  
Plaintiff : Case No. 89  
v. : C-0068-S  
MCI COMMUNICATIONS :  
CORP. :  
WESTERN TELE- :  
COMMUNICATIONS, :  
INC., and WESTMARC :  
COMMUNICATIONS, INC. :

-000-

I, John Wells King, declare:

1. I am a member of the law firm of Haley, Bader & Potts in Washington, D.C. I have represented MCI Telecommunications Corporation ("MCI") in numerous proceedings before the Federal Communications Commission ("FCC" or "Commission"). I am a member of the District of Columbia Bar and the Nebraska State Bar.

2. I make this Declaration in support of MCI Communications Corporation's motion for summary judgment in the above-captioned

case. I have reviewed the complaint filed by TeleSTAR, Inc. ("TeleSTAR") and am familiar with the allegations TeleSTAR has made concerning MCI and Western Tele-Communications Inc. ("WTCI").

3. I represented MCI in the FCC proceedings from which this law suit arises. Based on my involvement, I can state categorically that MCI did not misuse or corrupt those proceedings, and that MCI's conduct was at all times in full compliance with the FCC's rules and with the highest ethical standards.

4. MCI and TeleSTAR participated in two separate FCC proceedings: (1) proceedings concerning TeleSTAR's application for construction permits to build its microwave network; and (2) proceedings concerning TeleSTAR's petition to revoke certain of MCI's licenses.

5. The proceedings concerning TeleSTAR's application for construction permits had three basic phases.

- o First, the matter was referred by the Commission to an Administrative Law Judge ("ALJ") for an evidentiary hearing after WTCI challenged TeleSTAR's fitness to be a licensee. See WTCI' Petition to Dismiss (Exhibit 1 to this Declaration). MCI sent a letter supporting WTCI's position and played a limited role in the subsequent proceedings. See my letter to William J. Tricarico, FCC Secretary (Exhibit 2, to this Declaration). After the evidentiary hearing, the ALJ found that TeleSTAR was unfit to be an FCC licensee because of its repeated violations of FCC rules and lack of candor with the Commission See Exhibit 3 to this Declaration.
- o Second, TeleSTAR sought review of the ALJ' decision before the FCC Review Board, and after a full hearing, the Review Board upheld the ALJ's factual findings and conclusions of law. See Exhibit 4 to this Declaration.
- o Third, after a remand for additional evidence and findings (see Exhibit 5 to this Declaration) in which TeleSTAR refused to participate, the full Commission unanimously affirmed the decision of the ALJ to deny TeleSTAR its authorization and to dismiss TeleSTAR's applications. See Exhibit 6 to this Declaration.

6. In the proceedings initiated by TeleSTAR to revoke certain of MCI's FCC

authorizations, the FCC imposed a fine of \$10,000 for two inadvertent violations by MCI of the FCC's rules in the course of a massive construction program involving hundreds of projects and permits. The FCC found that MCI had been forthright with the Commission, and it expressly rejected TeleSTAR' contention that MCI's authorizations should be revoked. See Exhibit 7 to this Declaration.

7. FCC's rules against ex parte contacts in adjudicatory proceedings, 47 C.F.R., Sec. 1,1200 et seq., were in effect in both sets of proceedings, and MCI scrupulously observed them. To my knowledge, except for the settlement talks discussed in the next paragraphs of this Declaration, the only contact between representatives of MCI and the Commission and its staff on the merits of the issues in the proceedings concerning TeleSTAR's license applications was through formal filings before the Administrative Law

Judge, before the Review Board, and finally before the Commission itself.

8. In January 1988, the separate trial staff of the Common Carrier Bureau of the FCC initiated settlement talks. On behalf of MCI, I attended these talks, which took place in January and February 1988. FCC employees attended some of the settlement meetings. To my knowledge, Dale Brown did not attend or participate on the FCC's behalf.

9. MCI did not request that the FCC or the trial staff initiate or participate in settlement negotiations. The FCC employees who attended the meetings explicitly stated that the Commission was not a party to the talks and was not bound by any agreement that the parties might reach. MCI understood that the FCC had the right to deny TeleSTAR's applications if MCI withdrew its opposition as part of a negotiated settlement, and that the FCC had the right

to grant TeleSTAR's applications if MCI maintained its opposition after the failure of settlement negotiations. MCI never attempted to persuade the FCC to take a different position with respect to the effect of any potential settlement on the FCC's consideration of TeleSTAR's applications.

10. In these settlement negotiations, MCI indicated that it would not stand in the way of a settlement between the trial staff and TeleSTAR. When the trial staff and TeleSTAR sought MCI's imprimatur in a settlement providing for licensing a company that the ALJ and Review Board found unfit and that MCI considered unfit, MCI declined to give such an imprimatur without an assurance from TeleSTAR of a complete cessation of hostilities in all forums. At the outset of the negotiations, MCI was not aware that TeleSTAR wanted to reserve the right to initiate antitrust litigation

challenging MCI's successful advocacy in the FCC proceedings, but MCI's expressed desire for a complete cessation of hostilities at least implicitly covered TeleSTAR's release of any such claims. MCI explicitly requested such a release as soon as TeleSTAR made its intentions in absolute good faith.

Pursuant to 28 U.S.C. Sec. 1746, I declare under penalty of perjury that the foregoing is true and correct.

John Wells King /s/  
John Wells King

Executed: May 3, 1989

